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ALEXANDER L. STEVAS,
CLERK

No. 84-1428

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THOMAS M. TRECKER,

Petitioner,

v.

DANE T. SCAG, WISCONSIN MARINE, INC., and RANSOMES, SIMS AND JEFFERIES, LTD.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Was the imposition of "double costs" and "reasonable attorneys' fees" against counsel personally, without a hearing and without specific findings, a violation of the due process clause of the Fifth Amendment of the United States Constitution?

2. Was Trecker's appeal to the Seventh Circuit from a dismissal of his SEC Rule 10b-5 fraud action a frivolous appeal; was the Court's determination that the appeal was taken in "bad faith" for "delay, harassment or sheer obstinancy" supported by *any* evidence in the record?

3. Was the determination of the Wisconsin Court of Appeals IV in the state court stock redemption action, that the fraud committed on Trecker was immaterial, to be given collateral estoppel effect in his SEC Rule 10b-5 fraud action in the Federal District Court?

PARTIES

Thomas M. Trecker, Petitioner (and Hugh R. Braun).

Dane T. Scag, Wisconsin Marine, Inc., and Ransomes, Sims and Jefferies, Ltd., Respondents.

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DANE T. SCAG, WISCONSIN MARINE, INC.,
and RANSOMES, SIMS AND JEFFERIES, LTD.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner, Thomas M. Trecker respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on November 6, 1984.

CITATION TO OPINIONS BELOW

The opinion of the Court of Appeals, is reported at 747 F.2d 1176 (7th Cir. 1984); the opinion of the District Court is reported at 569 F. Supp. 744 (E.D. Wis. 1983). (See appendix p. 1a, 8a).

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals of the Seventh Circuit was entered on November 6, 1984. A timely petition for rehearing was denied on December 7, 1984. The judgment was modified on January 10, 1984 by assessing double costs in the amount of Two Hundred Twenty ($220.00) Dollars against Trecker's attorney Hugh R. Braun personally. The judgment was further modified on January 25, 1985 by the assessment against Braun of attorneys fees in the amount of Three Thousand Four Hundred Sixty-five ($3,465.00) Dollars. This Petition for Certiorari was filed within ninety days of that date. The court's jurisdiction is invoked under 28 U.S.C.A. 1254(1).

STATUTORY PROVISIONS INVOLVED

Fed.R.App.P.—RULE 38

28 U.S.C.A. Sec. 1927

SECURITIES AND EXCHANGE ACT OF 1934, Sec. 10(b), 15 U.S.C.A. 78j(b)

SEC RULE 10b-5

STATEMENT OF THE CASE

This dispute arose between Thomas M. Trecker and his brother-in-law, Dane T. Scag, who had formed a Wisconsin corporation in 1971 to engage in the manufacturer of snow blowers, and related equipment. At the outset, Scag owned 60% of the stock and Trecker 40%.*

Because the initial growth of the company did not warrant Trecker's employment which was originally intended, Trecker asked for redemption of his stock in December, 1973 pursuant to a Stock Purchase Agreement which had been signed by the parties at the start of the venture. The company was not in a financial position to redeem Trecker's stock in December, 1973 and did nothing about his demand. Trecker started an action in the Circuit Court of Jefferson County in December, 1976 to compel redemption of his stock pursuant to the stock purchase agreement. Judgment was eventually entered in his favor in that action on May 23, 1978 and the defendant was given 18 months to pay the judgment in the amount of $160,845.13 plus

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*The Affidavit of Thomas M. Trecker in opposition to the first Motion for Summary Judgment contains a complete chronological recitation of all facts material to the case (R-48). See also Affidavit of Attorney Hugh R. Braun in support of motion for reconsideration (R-64). Extensive detailing of the facts can also be found in the following reported decisions of *Trecker v. Scag,* 481 F. Supp. 861 (E.D. Wis. 1979); 500 F. Supp. 752 (E.D. Wis. 1980); 514 F. Supp. 364 (Ed. Wis 1981); and 679 F.2d 703 (7th Cir., 1982).

$5,026.00 in costs and interest. On June 26, 1978, Scag moved to prepay the judgment to permit entering into an agreement with a British firm, Ransomes, Sims and Jefferies, Ltd. It was represented at that hearing that Trecker's 34% interest in the company was being to sold to Ransomes for $124,176.00, less than the amount that had been ordered paid to Trecker in his redemption action. Under the agreement, Ransomes obtained an option to bu the balance of the company on a formula based on future earnings. Scag refused to give Trecker a copy of the agreement at the June 26, 1978 hearing.

Trecker objected to the state court's valuation of [illegible] stock as of December 31, 1976 when its book value was $402.00 per share instead of May 23, 1978, the date of judgment, when its book value was $715.00 per share. He appealed the state court's valuation of his stock to the Wisconsin Court of Appeals IV. It affirmed the trial court on November 27, 1979 and held that the valuation of Trecker's stock as of December 1976 was a reasonable exercise of discretion. It held further that Trecker's demand for redemption in December 1973 was irrevocable.

In July 1979 Trecker learned that his 34% interest in the company had been sold for $624,176.00 on June 30, 1978, not $124,176.00 as had been represented to him and the court on June 26, 1978.

After making this discovery, Trecker started an action in August 1979 under Section 10b of the Securities and Exchange Act of 1934 in the Federal District Court for the Eastern District of Wisconsin. That action was dismissed on the ground that it was time barred and that the alleged fraud was not material. Trecker appealed to the Seventh Circuit Court of Appeals which on June 3, 1982 reversed the dismissal by the District Court and returned the case for trial. [679 F.2d 703 (7th Cir., 1982)]. One of the principal issues involved was whether the November 27, 1979 Wisconsin Court of Appeals IV decision, holding that Trecker's 1973 demand for redemption was irrevo-

cable, was to be given collateral estoppel effect in the federal courts. The Seventh Circuit concluded that this ruling by the Wisconsin Court of Appeals IV was dicta, having been formulated in an equitable action for specific performance of a stock purchase agreement, and was not to be given collateral estoppel effect. The Seventh Circuit then returned the case for trial in the District Court of Wisconsin for a determination of whether Trecker's demand for redemption was irrevocable. All agreed that if Trecker's demand for redemption was revocable, the fraud committed on him was material.

In the meantime (March 1980), Trecker had moved the state court to reopen all aspects of his stock redemption action on the ground that Scag deliberately misrepresented that Trecker's stock was to be sold to Ransomes for $124,176.00 while in fact the agreement then in possession of Scag and his counsel provided in paragraph 1 that the stock was to be sold for $624,176.00. Trecker's motion to reopen the State Court proceeding because of "fraud on the Court" was denied by Judge Danforth on July 15, 1981. On July 21, 1982, the Wisconsin Court of Appeal IV affirmed Judge Danforth's refusal to reopen and held that Trecker's election to redeem was irrevocable. The Wisconsin Supreme Court denied review on October 12, 1982.

In the proceeding in the Trial Court on the motion to reopen, no testimony was taken before Judge Danforth and no oral arguments of counsel were heard. In its decision regarding Judge Danforth's refusal to reopen, the Wisconsin Court of Appeal IV acknowledged that Judge Danforth, who perceived that an allegation of a post-redemption fraud was involved, misunderstood the issue of "non disclosure" and "fraud on the court" raised by Trecker's motion; the Appeals Court, however, proceeded to affirm Danforth's refusal to reopen on the ground that it had already held in the previous decision in 1979 that "Trecker's 1973 demand for redemption was irrevocable".

This decision of the Wisconsin Court of Appeals IV was forwarded to the Seventh Circuit Court of Appeals on July 23, 1982 by Scag's counsel asking for reconsideration of his petition for rehearing of its June 3, 1982 decision, which had been denied by written order dated July 20, 1982. The Seventh Circuit issued an order dated July 30, 1982 in which it declined to reconsider its denial of Scag's petition for rehearing. However, at the base of the order this significant language was added:

> "Defendants now have the information we said they lacked and should put before Judge Gordon, see pages 13-14 of our June 3 slip opinion. When they do so, we are confident that Judge Gordon will take appropriate action unless the Supreme Court of Wisconsin should disagree with the Wisconsin Court of Appeals opinion. Nothing in our slip opinion requires a change in the light of the Wisconsin Court of Appeals July 21 opinion in *Trecker v. Wisconsin Marine, Inc.*" (App. p. 18a) App. p.

On October 12, 1982, the Wisconsin Supreme Court denied review of the Wisconsin Court of Appeals IV decision rendered on July 21, 1982.

On October 22, 1982, Scag moved the Federal District Court for the Eastern District of Wisconsin to dismiss Trecker's fraud action which was awaiting trial following remand. District Judge Gordon eventually granted the dismissal on August 25, 1983 holding that the determination of the Wisconsin Court of Appeals IV that "Trecker's demand for redemption of his stock in December, 1983 was irrevocable" was to be given collateral estoppel effect. Judge Gordon made specific reference to the Seventh Circuit order dated July 30, 1982 (supra).

Trecker immediately appealed to the Seventh Circuit claiming that the issue of collateral estoppel had been decided in Trecker's favor by the Seventh Circuit of Appeals on June 3, 1982 [679 F.2d 703 (7th Cir., 1982)] and that precedent

should be followed regardless of the state court's refusal to reopen the judgment in the redemption action.

On November 6, 1984, the Seventh Circuit affirmed Judge Gordon's dismissal of the action and imposed sanctions (double costs and reasonable attorney's fees) on Braun, Trecker's counsel, 747 F.2d 1176 (1984). The court reasoned that Trecker could not have had a reasonable expectation of prevailing on appeal in view of the court's order dated July 30, 1982; the court found that the appeal was frivolous and taken in "bad faith" because "we can think of no other reason for this appeal other than delay, harassment or sheer obstinancy".

A petition for rehearing on the limited issue of the assessment of double costs and reasonable attorneys fees was denied on December 7, 1984. Double costs of $220.00 were assessed on January 10, 1985 and attorney's fees of $3,465.00 were assessed on January 25, 1985.

ARGUMENT

1. THE IMPOSITION OF SANCTIONS ON COUNSEL WITHOUT A HEARING AND WITHOUT SPECIFIC FINDINGS RAISES A GRAVE CONSTITUTIONAL ISSUE AFFECTING THE ADMINISTRATION OF JUSTICE IN THE FEDERAL COURTS.

The $220.00 in double costs and the $3,465.00 in attorney's fees assessed against attorney Braun constitute a significant penalty. However, the determination that Braun prosecuted a frivolous appeal and did so in bad faith is far more serious and the matter of concern. The effect of the imposition of these sanctions is the scaring of a reputation built by counsel since admission in 1956. The impact on counsel's standing in the bar and his local community and upon his relations with clients cannot be assessed precisely, but must be judged substantial and severe. Can such a penalty be imposed in the absence of a due process hearing in which the party charged is given notice of the nature of the charges against him, an opportunity to present an orderly and reasoned defense; can such a penalty be imposed without a determination by an independent arbiter who will evaluate the relevant evidence in terms of a specific standard and make specific findings? The procedure followed was in clear contravention of a recent ruling of the United States Supreme Court in *Railroad Express, Inc. v. Piper,* 447 U.S. 752, 65 L.Ed. 2d 488, 100 S. Ct. 2455, where the court said at p. 766:

> "The power of a court over members of its bar is at least as great as its authority over litigants. If a court may tax counsel fees against a party who has litigated in bad faith, it certainly may assess those expenses against counsel who willfully abuse judicial processes. See Renfrew, Discovery Sanctions: A Judicial Perspective, 67 Calif. L.Rev. 264, 268. Like other sanctions, attorney's fees certainly should not be assessed lightly or without fair notice and an

opportunity for a hearing on the record. But in a proper case, such sanctions are within a court's powers." See also, *Hovey v. Elliott,* 167 U.S. 409, 42 L.Ed. 215, 17 S. Ct. 841.

No notice was given to counsel of the court's intention to impose sanctions nor was any opportunity provided for a hearing at which counsel could present evidence justifying the taking of the appeal. While a petition for rehearing was filed, and an affidavit submitted, the petition was denied without comment.

If a writ of certiorari is granted, Trecker will present the formidable argument that the failure to grant a hearing before imposition of sanctions was a clear violation of the due process clause of the Fifth Amendment and the recent ruling of the court in *Railroad Express, Inc.,* supra.

(a) The Appeal Was Not Frivolous, Was Not Taken In Bad Faith.

The sole basis for the determination of frivolousness and the determination of bad faith was that counsel appealed despite an ex parte order of the Seventh Circuit dated July 30, 1982 which provided in part as follows:

"Defendants now have the information we said they lacked and should put before Judge Gordon, see pages 13-14 of our June 3 slip opinion. When they do so, we are confident that Judge Gordon will take appropriate action unless the Supreme Court of Wisconsin should disagree with the Wisconsin Court of Appeals opinion. Nothing in our slip opinion requires a change in the light of the Wisconsin Court of Appeals July 21 opinion in *Trecker v. Wisconsin Marine, Inc.*" (See App. p. 18a)

In his petition for rehearing, Braun submitted an affidavit which stated at paragraph 6:

"That at the time this appeal was perfected, counsel had clearly in mind the full contents of the Seventh Circuit's order dated July 30, 1982; that Trecker, however, had not

been given an opportunity to present to the court his view of the significance of the July 21 decision of the Wisconsin Court of Appeals IV because the July 30, 1982 order of the Seventh Circuit was formulated in connection with the defendants' petition for rehearing; that Trecker was not permitted to participate in that proceeding under Rule 40(a) Fed. R. App. P.; counsel believed he had a compelling duty to submit Trecker's arguments regarding the significance of the July 21, 1982 decision of the Wisconsin Court of Appeals IV to the Seventh Circuit, since the entire case now turned on the interpretation of that decision. That the only way Trecker's arguments could be heard by the Seventh Circuit is through this appeal."

It is conceded here and was conceded in the petition for rehearing that if at the time the July 30, 1982 order was considered, the Seventh Circuit had permitted Trecker to respond to the import of the 1982 Wisconsin Court of Appeals IV ruling, the matter would have clearly ended at that time.

Trecker appealed because the court chose to act ex parte, foreclosing Trecker from presenting his argument that the Wisconsin Court of Appeals decision on July 21, 1982 was no different from the ruling of the Wisconsin Court of Appeals IV on November 27, 1979 which the Seventh Circuit had ruled was not to be given collateral estoppel effect. [679 F.2d 703 (1982)].

The Seventh Circuit in its November 6, 1984 decision imposing sanctions, distinguished between the 1979 decision of the Wisconsin Court of Appeals IV and the court's July 21, 1982 decision although both decisions affirmed the same rule of law [Trecker's demand for redemption of his stock in 1973 was irrevocable] and was made upon exactly the same record. The ex parte order of July 30, 1982 effectively reversed the Seventh Circuit's prior written and published decision on June 3, 1982 by implying that the 1982 decision of Wisconsin Court of Appeals IV would be given collateral estoppel effect. No explanation of the court's reasoning was provided. However,

the effect of the order was to direct dismissal of Trecker's fraud action in the District Court. Subtle aspects of the law of collateral estoppel were thus decided summarily in an ex parte proceeding.

Trecker believed that if the matter were returned to the Seventh Circuit and carefully briefed and argued, the court would realize there was no difference between the first ruling of the Wisconsin Court of Appeals IV in 1979 and its identical ruling to the same effect in 1982. Whatever the probable result, counsel concluded that he had an absolute duty to assure that Trecker's position with reference to the second ruling of the Wisconsin Court of Appeals IV was heard and considered. There was nothing frivolous about the appeal. There was not the slightest indication that it was taken in bad faith. Trecker had been victimized by an outrageous fraud in clear violation of Sec. 10b of the Securities and Exchange Act of 1934 and SEC Rule 10b-5 involving at least a half million dollars. His action should not have been dismissed by an ex parte order. Counsel had a duty to appeal.

2. THE UNDERLYING QUESTION OF WHETHER THE SECOND DECISION OF THE WISCONSIN COURT OF APPEALS IV ON JULY 21, 1982 SHOULD BE GIVEN COLLATERAL ESTOPPEL EFFECT IN THE FEDERAL COURTS SHOULD BE REVIEWED AND DECIDED, BOTH AS A NECESSARY ADJUNCT TO RESOLVING THE APPROPRIATENESS OF THE IMPOSITION OF SANCTIONS ON COUNSEL AND BECAUSE THE COLLATERAL ESTOPPEL ISSUE OF THE KIND RAISED HERE FREQUENTLY ARISES IN THE FEDERAL COURTS.

In its decision on November 27, 1979, the Wisconsin Court of Appeals IV decided that Trecker's demand for redemption made on December 29, 1973 was irrevocable. The record

before it at the time was the record of the trial in which Trecker successfully obtained a judgment requiring redemption of his stock. Trecker appealed from the judgment on the ground that his stock had been valued in December, 1976 rather than May, 1978 when judgment was entered. Reviewing the issues regarding the appropriateness of the date of valuation, the Wisconsin Court of Appeals IV concluded that the December 1976 valuation date was appropriate as an exercise of discretion in an equitable proceeding and that Trecker's 1973 demand for redemption was irrevocable. If Trecker's demand for redemption was irrevocable, the subsequent fraud of non-disclosure and deliberate misrepresentation of the sales price of his interest in the company was rendered immaterial. The materiality issue was raised by counsel for Scag in the fraud action in the Federal District Court. Judge Gordon initially ruled against the application of the doctrine in 481 F. Supp. 861 (E.D. Wis. 1979); he later reversed his position on the issue in 514 F. Supp. 364 (E.D. Wis. 1981). The Seventh Circuit in 679 F.2d 703 (7th Cir. 1982) held that Judge Gordon was correct in 1979 when he held that the Wisconsin Court of Appeals IV ruling was not to be given collateral estoppel effect.

After Trecker learned of the fraud of Scag in misrepresenting the value at which his interest in the company was sold to Ransomes, he placed the Circuit Court of Jefferson County on notice of the fraud on March 25, 1980. After taking discovery regarding all aspects of the fraud, he moved to reopen the entire state court judgment on August 8, 1980. Without taking any evidence in connection with the motion and without hearing oral argument of counsel, Judge John B. Danforth denied the motion to reopen on the ground that the fraud occurred after redemption and was therefore not material. That refusal to reopen the judgment was appealed to the Wisconsin Court of Appeals IV which eventually affirmed Judge Danforth's ruling on July 21, 1982. In its decision however, it conceded that Judge Danforth misconceived the

basis for Trecker's motion to reopen. It proceeded however, to affirm Danforth's refusal to reopen, relying on its 1979 decision that Trecker's 1973 demand for redemption was irrevocable, and therefore held that the fraud was immaterial. The record on which this determination was made was identical to the record on which the 1979 had been made. No new evidence of any kind was received in the course of processing Trecker's motion to reopen the judgment because of fraud.

In *Trecker v. Scag, et al,* 679 F.2d 703 (7th Cir. 1982), decided on June 3, 1982, the Seventh Circuit held that the Wisconsin Court of Appeals IV ruling that Trecker's demand for redemption in December, 1973 was irrevocable, was not to be given collateral effect in the Federal Courts. It said at page 709, note 14:

> "The defendants did argue that a state court finding —that Trecker had become a creditor rather than a shareholder of WMI as of his 1976 redemption demand—amounted to a decision that his election was irrevocable then, and that this finding would be given collateral estoppel effect in the federal litigation. The district court correctly rejected that contention, 500 F. Supp. at 753. The state court was only concerned with choosing an appropriate valuation date, not with whether Trecker could have changed his mind about the lawsuit."

The traditional rule in the federal courts has been that state court rulings will not be given collateral estoppel effect upon issues that were not fully and fairly litigated in the state courts. *Butler v. Stover Bros. Trucking Co.,* 546 F.2d 544 (1977), and *Guenther v. Holmgreen,* 738 F.2d 879 (7th Cir., 1984). The uncontrovertible fact established in this record is that Trecker was never given an opportunity to litigate whether he had a right to withdraw his demand for redemption. That issue was not before the court in Trecker's trial in 1977 where he sought enforcement of the stock purchase agreement with Scag and Wisconsin Marine, Inc. Nor was it an issue in his subsequent

motion to reopen the entire state court judgment which was filed in 1980 and eventually decided in 1982. Whether Trecker had a right to withdraw his demand for redemption was an issue involving a body of facts which were never placed in the record. The Seventh Circuit decided the collateral estoppel issue correctly in 1982. It should not have changed its position on that issue, particularly in a proceeding in which Trecker was not permitted to participate. Fed. R. App. P. Rule 40a.

Further, the court will be asked to consider that the state court's determination that Trecker could not withdraw his demand for redemption is contrary to fundamental rules of contract law. Trecker demanded redemption of his stock on December 29, 1973. The stock purchase agreement provided that the stock was to be redeemed within one (1) year. Scag and Wisconsin Marine, Inc. could not redeem the stock because they did not have the money and that situation existed up to and through the time of judgment in May 1978 when the court, recognizing the lack of funds, provided eighteen (18) months to pay the $165,000 that had been determined to be the value of Trecker's interest in the company. Wisconsin Marine, Inc. obviously breached the terms of the stock purchase agreement with Trecker by not buying his stock within the year provided for in the agreement. Under these circumstances, Trecker could certainly have withdrawn his demand for redemption at any time. His offer to have his stock redeemed had not been accepted by Wisconsin Marine, Inc.; in fact, it vigorously resisted redemption of his stock until forced by judgment in May 1978 to do so. This is a situation where the federal courts have discretion to reject a patently erroneous state court ruling that has the effect of foreclosing a litigant from obtaining rights under a federal statute. *Kohler v. Kohler,* 319 F.2d 634 (7th Cir., 1963); *McClure v. Borne Chemical Co.,* 292 F.2d 824 (3rd Cir., 1961); see also, Comment, The Prospects for Rule X-10 B-5; An Emerging Remedy for Defrauded Investors, 59 Yale L.J. 1120 (1950).

3. THE IMPOSITION OF SANCTIONS ON COUNSEL LITIGATING IN THE FEDERAL COURT IS A SUBJECT RIPE FOR REVIEW AND EVALUATION.

The facts and circumstances under which the penalties were imposed in this case raise grave doubt about the appropriateness of the penalties and the validity of the procedures followed. The problems with attorney discipline in the federal courts under Rule 11 Fed. R. Civ. P., Rule 38 Fed. R. App. P. and 28 U.S.C. 1927 have attracted the concern of the bar.

David Austern of the Georgetown University Law Center commented recently in *Trial,* Volume 20, Number 7, p. 14 (July 1984) about Rule 38 and 28 U.S.C. 1927. He said:

> "Apparently there is a new standard: Trial lawyers are required to be zealous, but not too zealous. They are required to be competent, but not to the extent that they take their client's word for the facts. These are confusing standards. While nobody can seriously argue against the intent of the amended Rule 11—to prevent abuse in litigation—the method chosen to achieve the result is troubling and in conflict with ethical codes.
>
> "Why not leave to the existing disciplinary systems the obligation to sanction attorneys who are abusive in litigation? During a time in which greater numbers of attorneys are being disciplined, it is inappropriate to place the responsibility of attorney discipline in the courts of more than 1,000 federal judges and magistrates. The idiosyncratic nature of the attorney discipline that will result—and already has—is inherent in the procedure, and the subjective nature of the standard—what is abusive?—only makes the problem worse."

CONCLUSION

For the stated reasons, a writ of certiorari should issue to review the entire judgment and opinion of the Seventh Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX

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Opinion of Seventh Circuit, November 6, 1984

Opinion of District Court, August 28, 1983

Order Assessing Attorney's Fees, January 25, 1985

Order Assessing Double Costs, January 10, 1985

Order Denying Petition for Rehearing, December 7, 1984

Ex Parte Order, July 30, 1982

In the

United States Court of Appeals

For the Seventh Circuit

No. 83-2725

THOMAS M. TRECKER,

Plaintiff-Appellant,

v.

DANE T. SCAG, WISCONSIN MARINE, INC., and RANSOMES, SIMS AND JEFFERIES, LTD.,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 79-C-694—Myron L. Gordon, *Judge.*

SUBMITTED OCTOBER 24, 1984*
—DECIDED NOVEMBER 6, 1984

Before CUMMINGS, *Chief Judge*, and ESCHBACH and FLAUM, *Circuit Judges.*

CUMMINGS, *Chief Judge.* Plaintiff Thomas Trecker and one of the defendants, Dane Scag, formed Wisconsin

* After preliminary examination of the briefs, the court notified the parties that it had tentatively concluded that oral argument would not be helpful to the court in this case. The notice provided that any party might file a "Statement as to Need of Oral Argument." *See* Rule 34(a), Fed. R. App. P.; Circuit Rule 14(f). Plaintiff-appellant has filed such a statement and requested oral argument. Upon consideration of that statement, the briefs, and the record, the request for oral argument is denied and the appeal is submitted on the briefs and record.

Marine, Inc. ("WMI") in 1971, each receiving part of the company's stock. The two men agreed that if WMI could not employ Trecker full-time, he could redeem his stock in WMI at book value or the original issuance price, whichever was higher. Plaintiff asked for redemption of his shares in 1973, but WMI did not act on his request until 1976 when it rejected the redemption demand. Trecker then filed an action in a Wisconsin court, requesting specific performance of the redemption agreement. The state court granted specific performance, ruling that plaintiff was entitled to the value of the shares as of December 31, 1976—approximately $165,000.00 (including interest). The judgment provided for payment of this sum in three installments.

Before the state court rendered its decision, Scag began negotiating with another party, defendant Ransomes, Sims and Jefferies, Ltd. ("Ransomes"), to purchase Trecker's interest in WMI. Ransomes agreed to buy Trecker's redeemed shares from WMI for nearly $625,000.00. After the state court entered final judgment on Trecker's specific performance claim, Scag moved for permission to prepay the entire judgment so that an agreement with an "investor" to acquire outstanding shares of WMI could be completed. At a hearing on the motion, Scag and WMI refused to introduce a copy of the agreement with Ransomes. Scag's counsel, however, summarized the agreement orally and told the court, *inter alia*, that Trecker's stock was to be sold for $124,000.00. The court granted Scag's prepayment motion in June 1978.

In 1979, plaintiff learned that Ransomes bought Trecker's WMI stock for $625,000.00. He then filed the instant action, alleging that the concealment and misrepresentations of Scag and WMI regarding the agreement with Ransomes violated § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5, 17 C.F.R. § 240.10b-5. Defendants' motion to dismiss was denied, 481 F. Supp. 861 (E.D. Wis. 1979), but their motion

for summary judgment was granted on the basis of the statute of limitations, 500 F. Supp. 752 (E.D. Wis. 1980), and that the failure to disclose was not material or deliberate, 514 F. Supp. 364, 367-368 (E.D. Wis. 1981). This Court vacated and remanded for further consideration of one aspect of Wisconsin law: the right to withdraw a redemption demand after it is made. *Trecker v. Scag*, 679 F.2d 703, 709-710 (7th Cir. 1982). We summarized plaintiff's argument as follows:

> All that Trecker can now be saying in this Rule 10b-5 action is that if he had known of Ransomes' negotiations during the pendency of his redemption suit, he would have abandoned it and held on to his shares. If Trecker could have done that, then neither materiality nor scienter is precluded and he has stated a claim under Rule 10b-5.

Id. at 709 (footnote omitted).

In the meantime, plaintiff had filed a motion to reopen the state court proceedings because of defendants' fraud. On July 21, 1982, shortly after we released our opinion, the Wisconsin Court of Appeals affirmed the trial court's order denying Trecker's motion to reopen the state court judgment. In its opinion, the Court of Appeals confronted and decided the specific issue Trecker raises in the instant appeal:

> Trecker argues that had the trial court known that all of the stock of Wisconsin Marine was to be sold to Ransomes, the court would have allowed him to withdraw his stock redemption demand. That option was not available to Trecker * * * .
>
> Trecker's rights as against Wisconsin Marine were fixed on December 29, 1973. He cannot convert his interest in the corporation from equity to debt and back again, according to the corporation's changing financial circumstances. His decision is irrevocable.

Trecker v. Wisconsin Marine, Inc., No. 81-1949, slip op. at 8-9 (Wis. Ct. App. July 21, 1982).

The defendants then filed a motion in this Court to reconsider our decision. The motion was denied by an order stating in part: "Defendants now have the information we said they lacked and should put before Judge Gordon * * *. When they do so, we are confident that Judge Gordon will take appropriate action unless the Supreme Court of Wisconsin should disagree with the Wisconsin Court of Appeals July 21 opinion in *Trecker v. Wisconsin Marine, Inc.*" *Trecker v. Scag*, No. 81-1888 (7th Cir. July 30, 1982) (order denying motion to reconsider). The Wisconsin Supreme Court subsequently denied Trecker's petition for review. Judge Gordon granted defendants' summary judgment motion on August 25, 1983. This appeal followed.

I.

Trecker concedes that if his demand for redemption could not have been withdrawn, then defendants' alleged fraud was not material. Appellant's Reply Brief at 3. Trecker also concedes that the Wisconsin Court of Appeals stated that he could not withdraw his redemption demand. Plaintiff argues, however, that the decision of the Wisconsin Court of Appeals should not be given collateral estoppel effect[1] for two reasons. The first is that this Court has already decided that the state court decision should not be given collateral estoppel effect in this litigation. This argument is totally meritless. In our 1982 opinion, we declined to apply collateral estoppel to a 1979 state court

[1] Plaintiff's other contention on appeal—that defendants' fraud estops them from contesting the materiality of their misrepresentations—is without merit. Materiality is an element of plaintiff's cause of action. 17 C.F.R § 240.10b-5(b); *Wright v. Heizer Corp.*, 560 F.2d 236, 249 (7th Cir. 1977), certiorari denied, 434 U.S. 1066. If a defendant's fraud estopped a challenge to the materiality of a misrepresentation, a plaintiff in a securities fraud case would never have to establish materiality.

ruling that the redemption demand could not have been withdrawn because it was dicta; the issue in that state court case concerned choosing an appropriate date for valuing Trecker's stock. 679 F.2d at 709 n.14. In contrast, the 1982 state court decision decided the precise issue Trecker wants to relitigate in federal court; moreover, that court had to rule on the issue of withdrawal of redemption demands in order to decide the case. *Trecker v. Wisconsin Marine, Inc.*, slip. op at 8.

Plaintiff's other collateral estoppel argument fares no better. Trecker contends that he did not have a "full and fair opportunity" to litigate the redemption withdrawal issue in state court. *See generally Guenther v. Holmgreen*, 738 F.2d 879, 883-884 (7th Cir. 1984). The record belies this assertion. The Wisconsin Court of Appeals decision itself declared: "*Trecker argues* that had the trial court known that all of the stock of Wisconsin Marine was to be sold to Ransomes, the court would have allowed him to withdraw his stock redemption demand." *Trecker v. Wisconsin Marine, Inc.*, slip op. at 8 (emphasis added). Moreover, plaintiff's petition for review to the Wisconsin Supreme Court stated that one of the issues for consideration was the right to withdraw a redemption demand prior to judgment. Appellees' Brief at 8-9. There is no doubt that plaintiff received a full and fair opportunity to litigate this issue in the Wisconsin courts and he has pointed to nothing in the record which would suggest otherwise. Having lost in state court, he cannot ask the federal courts to reconsider the same question.

II.

Defendants assert that this appeal is frivolous and ask us to award "extraordinary costs" to defendants and their counsel.[2] We assume (for no authority is cited) that

[2] Defendants have also requested that we dismiss this appeal because it is frivolous. We have no authority for this sanction, except for appellants proceeding *in forma pauperis*. *See* 28 U.S.C. § 1915(d).

defendants are attempting to invoke our power to impose sanctions pursuant to Fed. R. App. P. 38, which provides that we may award damages (including attorneys' fees, *Reid v. United States*, 715 F.2d 1148, 1154 (7th Cir. 1983)) and single or double costs if an appeal is frivolous. The conclusion that this appeal is frivolous seems inescapable. In the first appeal, we remanded for a determination whether Wisconsin law permitted a redemption demand to be withdrawn. After the decision of the Wisconsin Court of Appeals, we indicated in no uncertain terms that its decision disposed of that issue unless the Wisconsin Supreme Court reached a different conclusion. *Trecker v. Scag*, No. 81-1888 (7th Cir. July 30, 1982). When the Wisconsin Supreme Court declined to review the case, it should have been apparent to plaintiff's counsel that we would affirm the granting of summary judgment in favor of defendants.

The second factor we must consider before awarding costs and fees is whether this is an appropriate case for sanctions. *Gilles v. Burton Construction Co.*, 736 F.2d 1142, 1146 (7th Cir. 1984). This seems to be one of those cases where persistence in litigation is itself evidence of bad faith. *Reid v. United States*, 715 F.2d at 1155. Plaintiff's arguments on appeal lack any arguable merit at all. We can think of no other reason for this appeal other than delay, harassment or "sheer obstinancy." *Id.* Plaintiff could not have had any "reasonable expectation of altering the district court's judgment," *id.*, in light of our order of July 30, 1982. *See also Merit Ins. Co. v. Leatherby Ins. Co.*, 737 F.2d 580 (7th Cir. 1984) (per curiam), certiorari denied, 53 U.S.L.W. 3285 (No. 84-323); *Scudder v. Town of Greendale*, 704 F.2d 999, 1002-03 (7th Cir. 1983). Accordingly, double costs and reasonable attorneys' fees are assessed against plaintiff's counsel.

No. 83-2725 7

The judgment of the district court is AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 50234—Pandick Midwest, Inc., Chicago—11-6-84—450

UNITED STATES DISTRICT COURT

Eastern District of Wisconsin

THOMAS M. TRECKER, *Plaintiff,* *v.* DANE T. SCAG, WISCONSIN MARINE, INC., and RANSOMES, SIMS AND JEFFERIES, LTD., *Defendants.*	No. 79-C-694

DECISION and ORDER

In 1981, I granted the defendants' motion for summary judgment. Trecker v. Scag, 514 F. Supp. 364 (E.D. Wis. 1981). That decision and order was vacated by the court of appeals for the seventh circuit. Trecker v. Scag, 679 F.2d 703 (7th Cir. 1982). The court of appeals remanded with instructions that I resolve a matter of state law before deciding the summary judgment motion; that matter has now been resolved, and the defendants' motion for summary judgment will be granted.

The plaintiff has moved to amend his complaint to add two state law claims. My conclusion that the defendants are entitled to summary judgment renders the plaintiff's motion moot, and it will be dismissed.

The facts of the case have been set out at length in earlier decisions and need be stated only briefly here. The plaintiff, Mr. Trecker, and one of the defendants, Mr. Scag, founded Wisconsin Marine, Inc. (WMI) in 1971. The parties agreed in 1972 that, if the corporation was unable to employe Mr.

Trecker full-time, he could redeem his shares at book value. The corporation could not employ Mr. Trecker full-time and, in December, 1973, he wrote to WMI's board terminating his relationship with the corporation and exercising his right to redeem his shares.

It was not until December, 1976, that the WMI board met and rejected Mr. Trecker's redemption demand, apparently because WMI lacked the necessary funds. Shortly thereafter, Mr. Trecker filed an action in Wisconsin state court seeking specific performance of the redemption agreement. In February, 1978, the state trial court decided that Mr. Trecker was entitled to specific performance of the agreement. In May, 1978, the trial court ruled that Mr. Trecker should be paid $160,845 plus interest for his shares, valued as of December 31, 1976, the end of the quarter in which Mr. Trecker had made his final redemption demand. The court also ruled that WMI should be permitted to pay the judgment in installments.

After the state court trial had ended, but before the court had reached a decision, Mr. Scag began negotiating with an English firm, the defendant Ransomes, Sims and Jefferies, Ltd. (Ransomes), regarding the possible sale of Mr. Trecker's 34.2% interest in WMI. Under the agreement reached by Mr. Scag and Ransomes in February, 1978, WMI would receive from Ransomes $624,176 for the 34.2% of WMI shares redeemed by Mr. Trecker at $160,845 pursuant to the state trial court's decision.

After final judgment had been entered in state court, Mr. Scag asked the court's permission to prepay the judgment. When a hearing was held on the matter in June, 1978, Mr. Scag explained that an investor, Ransomes, had been found and that installment payments were no longer necessary. Unable to force disclosure of the terms of the agreement with Ransomes through the trial court, Mr. Trecker bought shares in Ransomes in order to receive the annual report. in July, 1979, Mr. Trecker

learned from the annual report that Ransomes had paid $624,176 for its 34.2% interest in WMI. Mr. Trecker then brought this action, claiming that Mr. Scag's failure to disclose WMI's negotiations with Ransomes violated SEC Rule 10b-5 (17 C.F.R. § 240.10b-5).

One of the grounds for my 1980 decision granting the defendants' motion for summary judgment was that the undisclosed WMI-Ransomes negotiations began four years after Mr. Trecker had exercised his right to redeem his shares and one year after he had reaffirmed his decision by bringing the action in state court. I concluded that the negotiations could not have influenced Mr. Trecker's investment decision and, therefore, that the non-disclosure was not material under SEC Rule 10b-5.

In 1982, the court of appeals for the seventh Circuit vacated my ruling and remanded. The court of appeals stated that the non-disclosure of the negotiations might, in fact, be material if, under the state law, Mr. Trecker could have changed his decision to redeem his shares after the negotiation had begun. The court very clearly formulated the issue which it is now my duty to decide:

> "All that Trecker can now be saying in this Rule 10b-5 action is that if he had known of Ransomes' negotiations during the pendency of his redemption suit, he would have abandoned it and held on to his shares. If Trecker could have done that, then neither materiality nor scienter is precluded and he has stated a claim under Rule 10b-5. The defendants conceded as much at oral argument." 679 F.2d at 709.

> "We regret further complications in an already protracted and internecine struggle, but the case should not have been resolved, and on remand cannot go forward, without an adequate development by the parties of this important aspect of Wisconsin law." 679 F.2d at 710.

This precise issue was decided against the plaintiff by the Wisconsin court of appeals in Trecker v. Wisconsin Marine,

Inc., No. 81-1949 (Wis. Ct. App. July 21, 1982). After learning Ransomes had paid $624,176 for 34.2% of WMI, Mr. Trecker had filed a "Notice of Fraud on the Court" in the state trial court. The state trial court denied Mr. Trecker's motion to reopen the May, 1978, judgment on the ground that the alleged fraud on the court occurred at the June, 1978, hearing on Mr. Scag's request to prepay the judgment and could not, therefore, have affected the February, 1978, decision which set the value for Mr. Trecker's shares. Mr. Trecker appealed to the Wisconsin court of appeals.

The Wisconsin court of appeals affirmed but went beyond the reasons given by the trial court because the trial court had failed to recognize that "Trecker's allegations can be read to include Wisconsin Marine's failure to disclose the negotiations before judgment was entered. . . ." (Slip op. at 8). Mr. Trecker argued that the non-disclosure was a fraud on the court because, had the trial court known of the pending stock sale, it would have allowed him to withdraw his suit. This would have obviated the need for the trial court to enter the May, 1978, judgment.

Although the context was fraud on the court rather than materiality, there can be no doubt that the Wisconsin court of appeals had before it the issue dispositive of the case at bar. Only if Mr. Trecker could have changed his decision to redeem his shares after learning of the Ransomes negotiations would the non-disclosure have been a fraud on the trial court. Similarly, only if Mr. Trecker could have changed his investment decision after learning of the Ransomes negotiations would the non-disclosure be material under SEC Rule 10b-5. The Wisconsin court of appeals resolved this issue of state law unambiguously:

> "Trecker argues that had the trial court known that all of the stock of Wisconsin Marine was to be sold to Ransomes, the court would have allowed him to withdraw

his stock redemption demand. That option was not available to Trecker." (Slip op. at 8).

"Trecker's rights as against Wisconsin Marine were fixed on December 29, 1973. He cannot convert his interest in the corporation from equity to debt and back again, according to the corporation's changing financial circumstances. His decision is irrevocable." (Slip op. at 9).

Immediately after the Wisconsin court of appeals reached this decision, the defendants filed with the court of appeals for the seventh circuit a motion to reconsider its decision to vacate my earlier grant of summary judgment. The court of appeals denied the motion but left no doubt that the state court of appeals decision had provided the law necessary to decide the summary judgment motion here:

"Defendants now have the information we said they lacked and should put before Judge Gordon, see pages 13-14 of our June 3 slip opinion. When they do so, we are confident that Judge Gordon will take appropriate action unless the Supreme court of Wisconsin should disagree with the Wisconsin Court of Appeals July 21 opinion in *Trecker v. Wisconsin Marine, Inc.*" Trecker v. Scag, No. 81-1888 (7th Cir. July 30, 1982) (order denying motion to reconsider).

On October 12, 1982, the Wisconsin supreme court denied the plaintiff's petition for review; thus, the state court of appeals' pronouncement on state law is authoritative. Applying that law to this Rule 10b-5 action, I must grant the defendants' motion for summary judgment on the ground that non-disclosure of the negotiations between WMI and Ransomes was immaterial to Mr. Trecker's decision to redeem his shares because, under state law, he could not have changed his decision after learning of the negotiations.

I reject the plaintiff's argument based on Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 238 (1944), that the defendants' alleged fraudulent misrepresentations estop them

from raising a materiality defense. *Hazel-Atlas* concerned materiality as an evidentiary concept and has no application in this Rule 10b-5 suit where materiality is one of the elements which the plaintiff must prove.

The plaintiff has moved to amend his complaint to add two state causes of action pendent to the federal Rule 10b-5 claim. Since the Rule 10b-5 claim will be dismissed, there is no longer a federal claim to which the state claims can attach. The motion to amend must therefore be dismissed.

Therefore, IT IS ORDERED that the plaintiff's motion to amend the complaint be and hereby is dismissed.

IT IS ALSO ORDERED that the defendants' motion for summary judgment be and hereby is granted.

IT IS FURTHER ORDERED that the plaintiff's action be and hereby is dismissed.

Dated at Milwaukee, Wisconsin, this 25 day of August, 1983.

/s/ MYRON L. GORDON
Senior U.S. District Judge

Mr. Sofron B. Nedilsky
Clerk, U.S. District Court
362 Federal Building
Milwaukee, WI 53202

Received
January 14, 1985
Godfrey, Trump & Hayes

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
219 So. Dearborn Street
Chicago, Illinois 60604

January 10, 1985

Taxed in favor of:
DANE T. SCAG, WISCONSIN MARINE, INC., and
RANSOMES, SIMS AND JEFFRIES, LTD.,
Defendants-Appellees.

BILL OF COSTS

In Cause No. U.S.C.A.-7 No. 83-2725
U.S.D.C. No. 79-C-694

THOMAS M. TRECKER,
Plaintiff-Appellant,

vs.

DANE T. SCAG, WISCONSIN MARINE, INC., and
RANSOMES, SIMS AND JEFFERIES, LTD.,
Defendants-Appellees.

	Cost of Each Item
1. For Docketing a case on appeal or review or docketing any other proceeding	$65.00
2. For Making a typed copy of any record or paper, per page.....	2.00
For Comparing with the original thereof any copy of any transcript of record, entry, record or paper, when such copy is furnished by the person requesting the certification, per page.	2.00

	Cost of Each Item	
For Certification of any document or paper, whether the certification is made directly on the document, or by separate instrument	2.00	
For a photographic reproduction of any record or paper, per page	.50	
3. For every search of the records of the court and certifying the result of same	2.00	
4. Charge for copy of an opinion of the court	2.00	
5. Costs of printing briefs, appendices and records, $110.00. Double costs allowed		$220.00
6.		
Total		$220.00

Mandate Issued: 11-29-84

Note: Bill of costs for attorney's fees is under advisement.

Copies Mailed To:

Hugh R. Braun, GODFREY, TRUMP & HAYES, 250 East Wisconsin Avenue, Ste. 1200, Milwaukee, WI 53202-4278

Richard S. Gibbs, GIBBS, ROPER, LOOTS & WILLIAMS, 735 North Broadway, Milwaukee, WI 53202

Received
Godfrey, Trump & Hayes
January 28, 1985

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

January 25, 1985.

By the Court:

THOMAS M. TRECKER,
Plaintiff-Appellant,

No. 83-2725 *vs.*

DANE T. SCAG, WISCONSIN MARINE, INC., and RANSOMES, SIMS AND JEFFERIES, LTD.,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Wisconsin.

No. 79-C-694

Myron L. Gordon,
Judge.

This matter comes before the court for its consideration upon the "BILL OF COSTS ON APPEAL" filed herein on November 20, 1984, by counsel for the defendants-appellees.

By published opinion of November 6, 1984, the judgment of the district court was affirmed and double costs and "reasonable attorneys' fees were assessed against plaintiff's counsel." Defendants-appellees request $3,465.00 as reasonable attorneys' fees and no objection has been received. Accordingly,

IT IS ORDERED that attorneys' fees, in the amount of $3,465.00, are awarded to defendants-appellees.

Received
December 10, 1984
Godfrey, Trump & Hayes

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

December 7, 1984

Before

Hon. WALTER J. CUMMINGS, *Chief Judge*
Hon. JESSE E. ESCHBACH, *Circuit Judge*
Hon. JOEL M. FLAUM, *Circuit Judge*

THOMAS M. TRECKER,
Plaintiff-Appellant,

No. 83-2725 *vs.*

DANE T. SCAG, WISCONSIN MARINE, INC., and RANSOMES, SIMS AND JEFFERIES, LTD.,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Wisconsin.

No. 79-C-694

Myron L. Gordon,
Judge.

ORDER

The plaintiff-appellant's petition for rehearing regarding the imposition of double costs and reasonable attorney's fees is denied.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

July 30, 1982.

Before
Hon. WALTER J. CUMMINGS, *Chief Judge*
Hon. LUTHER M. SWYGERT, *Senior Circuit Judge*
Hon. RICHARD A. POSNER, *Circuit Judge*

THOMAS M. TRECKER,
Plaintiff-Appellant,

No. 81-1888 *vs.*

DANE T. SCAG, WISCONSIN MARINE INC., and RANSOMES, SIMS and JEFFERIES, LTD.,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Wisconsin.

No. 79-C-694

Myron L. Gordon,
Judge.

ORDER

Defendants' motion for leave to file the Wisconsin Court of Appeals July 21, 1982 opinion in *Trecker v. Wisconsin Marine, Inc.,* is granted. The motion to reconsider the denial of the petition for rehearing is denied.

Defendants now have the information we said they lacked and should put before Judge Gordon, see pages 13-14 of our June 3 slip opinion. When they do so, we are confident that Judge Gordon will take appropriate action unless the Supreme Court of Wisconsin should disagree with the Wisconsin Court of Appeals opinion. Nothing in our slip opinion requires a change in the light of the Wisconsin Court of Appeals July 21 opinion in *Trecker v. Wisconsin Marine, Inc.*